Supreme Court, U. S.
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in the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1010

MIAMI HERALD PUBLISHING COMPANY, GENE MILLER, TIMES PUBLISHING COMPANY and ANGEL CASTILLO

Petitioners,

v.

THE HONORABLE BEN KRENTZMAN
United States District Court for
the Middle District of Florida

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[558 F.2d 1202]

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edward J. GURNEY et al., Defendants,

Miami Herald Publishing Company
et al., Movant-Appellants.

No. 75-3338.

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1977.

[558 F.2d 1204]

Appeals from the United States District Court for the Middle District of Florida.

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

Appellants, The Miami Herald Publishing Company (publisher of *The Miami Herald*), The Times Publishing Company (publisher of *The St. Petersburg Times*), Gene Miller, a reporter for *The Miami Herald*, and Angel Castillo, a reporter for *The St. Petersburg Times*, seek review of district court rulings [558 F.2d

1205] denying their requests to examine certain trial documents in a criminal proceeding.[1]

I. BACKGROUND

The trial in the case of United States v. Edward J. Gurney, et al., began on February 25, 1975. The case involved an incumbent United States senator at the time of indictment and generated considerable public interest. The proceedings were the subject of extensive news coverage. Several accommodations were made by the trial judge for representatives of the news media. Provisions were made for a telephone room for wire service representatives, reserved seating was secured for the press, and convenient but inconspicuous seating was furnished to a newspaper sketch artist.

The district judge discussed jury management questions with counsel before the trial began. Sequestration was considered, but defense counsel chose not to request such action in view of other measures adopted to insulate the jury. The judge admonished the jurors daily not to discuss the case, not to read any newspapers other than those cleared by counsel and given to the jurors by the Clerk, and not to listen to or view broadcasts concerning the trial. The attorneys were informed that the district judge expected to grant appropriate requests to conduct some of the proceedings ancillary and preliminary to the reception of evidence out of the hearing of the public.

[1]The trial in question was the criminal trial of former Senator Edward J. Gurney and others. (United States v. Gurney, et al., Case No. 74-122-CR-J, in the United States District Court for the Middle District of Florida.)

After the trial got under way and the government began putting on its case in chief, consisting in large part of documentary proof, the appellant newsmen sought to inspect various documents and exhibits, some of which were in evidence and some of which were only identified. The Clerk refused access to many of these items pursuant to oral directions of the district judge. Appellants then filed their "Petition for Hearing and for Vacation of Restrictions on Press and Other News Media" directed to the district court's denial of access. In this petition, the newspapers and reporters asked the trial court to remove the restrictions on their access to: (1) exhibits offered at trial for identification but not yet admitted; (2) exhibits admitted but not yet read to the jury; (3) exhibits offered but rejected; (4) the transcript of the grand jury testimony of Senator Gurney; (5) the witness list; (6) names and addresses of the jurors; and (7) defense exhibit No. 79, a copy of a purported statement of a witness, Larry Williams, to the F.B.I., which had been received in evidence. The petitioners asked further that the judge vacate any prior rulings entered during the trial as to such matters and that he reduce to writing those rulings not vacated.

On July 1, 1975, after conducting a hearing, the district judge entered a written order permitting: (1) inspection of exhibit No. 79; (2) inspection of a list of witnesses; and (3) examination by petitioners of exhibits received in evidence, subject to the availability of the Court's trial clerk. He denied: (1) unlimited disclosure of Senator Gurney's grand jury testimony;[2] (2) dis-

[2]At the hearing, the judge stated that appellants could obtain transcripts from the court reporter of those portions of the grand jury testimony that had been read to the jury.

closure of the names and addresses of the jurors; (3) access to the bench conferences with counsel;[3] and (4) access to exhibits identified but not received into evidence.

On July 16, 1975, the district judge orally denied appellants' further request for access to the transcript of a proffer of testimony received by the judge in camera at a bench conference. On July 30, 1975, after the jury was sequestered during its deliberations, appellants asked for leave to inspect a written communication to the judge from [558 F.2d 1206] the jury. A similar request was made on July 31, as to a communication from the trial judge to the jury. The district court orally denied both requests.[4] Appellants seek reversal of the district court's rulings.[5]

[3]In their petition, appellants did not seek direct access to bench conferences as such. This matter developed during the hearing, inasmuch as proffers of government exhibits, defense objections thereto, and rulings thereon occurred in the main during sidebar conferences between court and counsel.

[4]Appellants sought expedited review of the district court's actions by a Petition for Writs of Mandamus and Prohibition filed in this court. This Petition was denied by an order entered August 13, 1975.

pellants seek reversal of the district court's rulings.[5]

Appellants' primary claim is that the district judge violated their First Amendment rights when he denied the press access to various exhibits and transcripts, the jury list, and the written communications between the judge and the jury. Also at issue is whether the district judge violated the First and Fifth Amendments by fail-

[5]In addition, appellants request that the trial judge be directed:

> 1. Not to issue any orders or establish any unwritten rules restricting the flow of information to or access of Appellant reporters or other members of the press to the Court record and proceedings in a criminal trial without first giving the press notice and a reasonable opportunity to be heard and reducing such order to writing and causing it to be docketed with the Clerk.
>
> 2. Not to hold 'bench conferences' with the jury excused to deny Appellant reporters or other members of the press and the public access to information as to the conduct of a public trial or to employ any other devices to the same purpose or effect.
>
> 3. To permit Appellant reporters and other members of the press to inspect and view transcripts of all testimony and proffered testimony or, if no transcript is available, afford them the opportunity to have a transcript prepared at the expense of the party requesting it.
>
> 4. To permit Appellant reporters and other members of the press to inspect and view all written communications between the Judge and the jury.
>
> 5. To permit Appellant reporters and other members of the press to inspect and view all exhibits that have been identified and placed in the custody of the Clerk as part of the record of the Court."

Appellants' Brief at 28-29.

ing to: (1) hold a hearing and (2) issue a "special order"[6] regarding each of the appellants' requests to view materials. After careful consideration of the issues presented, we find that the district court's actions did not violate appellants' First or Fifth Amendment rights. Thus, we affirm the district judge's rulings.

II. JURISDICTION

[1,2] We must consider at the outset the jurisdictional questions of standing, finality, and mootness..

The appellee United States concedes that the reporters and their respective newspapers have standing to challenge the district court's decision regarding appellant's claimed right of access to the various trial documents. The appellants were the direct targets of the district court's rulings. The two requirements for establishing standing have been met—i.e. (1) there is a claim of injury in fact; and (2) the interest sought to be protected is arguably within the zone of interests to be

[6]Rule 16(C) of the General Rules of the Middle District of Florida deals with the use of special orders in widely publicized cases:

> C. Special Orders in Widely Publicized and Sensational Cases.
>
> In a widely publicized or sensational case, the Court on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

protected or regulated by the statute or constitutional guarantee in question. Data Processing Service v. Camp, 397 U.S. 150, 153-54, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Appellants have arguably suffered an injury with respect to newsgathering. Moreover, the district court's determinations arguably affected appellants' rights under the First Amendment. See Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975). We conclude that appellants' standing is established.

[3-5] The government contends that, although the July 1, 1975, written order was final and appealable, the three subsequent [558 F.2d 1207] oral rulings (July 16, 30 and 31) were not final orders, but merely incidental, non-reviewable regulations of trial management.

Title 28, U.S.Code §1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . ." The desire for judicial economy and the avoidance of unnecessary piecemeal appeals underlie the final judgment rule. See C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure: Jurisdiction, §3911 (1976); 9 J. Moore, Federal Practice ¶110.07 (2d ed. 1975).

The "collateral order" doctrine established by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 60 S.Ct. 1221, 93 L.Ed. 1528 (1949), provides an expansive interpretation of the finality requirement. A "collateral order" is one which finally determines a claim of right "separable from, and collateral to, rights asserted" in the main cause of action. Cohen, supra, 337 U.S. at 546-47, 69 S.Ct. at 1225-1226. Four basic requirements generally must be

satisfied before a matter is reviewable under the collateral order doctrine.

First, the matter must have been finally disposed of by the district court. But, if there is a "plain prospect that the trial court may itself alter the challenged ruling, there is little justification for immediate appellate intrusion. It is enough that no further consideration is contemplated". Wright, Miller and Cooper, supra, §3911 at 470. Second, the matter reviewed must be "separable from, and collateral to, rights asserted in the action". Cohen, supra, 337 U.S. at 546-47, 69 S.Ct. at 1225-1226. Finally, if denial of review entails the risk of "irreparable injury", and the case involves "a serious and unsettled question", the appeal should be granted. See Wright, Miller and Cooper, supra, §3911 at 470-71; Moore, supra ¶110.10 at 133.

In view of the underlying purpose of the final judgment rule and the particular facts in this case, we believe that the district judge's four rulings in question had sufficient finality to permit appeal. Although the three oral rulings may have lacked procedural formality, the appeal can be justified in light of: (1) the improbability of further consideration by the trial court; (2) the close similarity of issues disposed of by the written order and the oral rulings; and (3) the general importance of the rights involved. Moreover, the questions presented here could affect many other cases. See Wright, Miller and Cooper, supra.

[6] Mootness presents the final procedural hurdle. Appellee concedes that the appeal here is not moot. We agree. Despite the conclusion of the Gurney trial, the specific issues presented by the appellants are of a continuing nature. A case such as this one presents a controversy "capable of repetition yet evading review", Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), because "the underlying criminal proceeding would almost always terminate before the appellate court hears the case". United States v. Schiavo, 504 F.2d 1, 5 (3rd Cir. 1974), cert. denied, 419 U.S. 1096, 95 S.Ct. 690, 42 L.Ed.2d 688. See also Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

We proceed to the merits.

III. FIRST AMENDMENT CLAIM

The critical issue in this case is whether the trial court's rulings violated appellants' First Amendment freedoms. The district judge denied appellants access to (1) exhibits not yet admitted into evidence; (2) transcripts of bench conferences held in camera; (3) written communications between the jury and the judge; (4) list of names and addresses of jurors; and (5) Mr. Gurney's grand jury testimony.

[7] The question of media First Amendment newsgathering rights in the face of court or government restrictions has been the subject of much discussion but remains largely unsettled.[7] It is clearly established, [558

[7]See e. g. Note, The Rights of the Public and the Press to Gather Information, 87 Harv.L.Rev. 1505 (1974); Comment, Newsgathering: Second-Class Right Among First Amendment Freedoms, 53 Texas L.Rev. 1440 (1975); Comment, The Right of the Press to Gather Information After Branzburg and Pell, 124 U.Pa.L.Rev. 166 (1975).

F.2d 1208] however, that "[a] trial is a public event". Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). Members of the media are thus free to report whatever occurs in open court. Estes v. Texas, 381 U.S. 532, 541-42, 85 S.Ct. 1628, 1932, 14 L.Ed.2d 543 (1965); United States v. Dickinson, 465 F.2d 496, 509 (5th Cir. 1972).

[8] The First Amendment guarantees "special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech". Nebraska Press Assn. v. Stuart, supra, 427 U.S. at 556, 96 S.Ct. at 2801, 49 L.Ed.2d 683. Generally, orders proscribing publication of matters transpiring in open court are constitutionally infirm, absent some compelling justification. Id.; Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); United States v. Columbia Broadcasting System, Inc., 497 F.2d 102 (5th Cir. 1974). But the trial judge here did not resort to the use of prior restraints despite the case being much publicized. "A prior restraint . . . by definition, has an immediate and irreversible sanction". Nebraska Press Assn., supra, 427 U.S. at 559, 96 S.Ct. at 2803. No such restriction "freezing", id., speech was imposed. The district judge merely refused to allow the appellants to inspect documents not a matter of public record. Appellants were free to obtain whatever infor-

mation they desired from any source except from the district court and its supporting personnel.[8]

[9, 10] The Supreme Court has recognized that newsgathering warrants some degree of First Amendment protection "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated". Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed2d 626 (1972). The extent of such protection has remained uncertain, but it is clear that it is not

[8]Alternative sources of information were available to appellants: the parties, the witnesses, the attorneys and members of the public generally. Appellants' attempt to analogize the instant case to Columbia Broadcasting System, Inc. v. Young, text, supra, fails. In Young CBS sought mandamus from the Sixth Circuit against the judge (District Judge Don J. Young) who was about to try a number of civil cases arising from the Kent State shootings on the campus of that University on May 4, 1970. There was widespread attendant publicity, and Judge Young had entered a "gag" order restraining everyone remotely concerned with the cases, including counsel, parties, court personnel, relatives, friends and associates, from discussing the cases with the media or members of the public. Of course no such sweeping order is involved here.

without bounds. "The right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965). The First Amendment right to gather news has been defined in terms of information available to the public generally.[9] See Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); Branzburg, supra; Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977) [decided August 3, 1977].

The press cannot be denied access to any information already within the public domain. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Yet,

> "[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally . . . It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources . . . and that government cannot restrain the [558 F.2d 1209] publication of news emanating from such sources. . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court". (citations omitted).

[9]"When representatives of the communications media attend trials they have no greater rights than other members of the public". Estes v. Texas, 381 U.S. 532, 584, 85 S.Ct. 1628, 1654, 14 L.Ed.2d 543 (1965) (Warren, J., concurring).

Pell, supra, 417 U.S. at 834-35, 94 S.Ct. at 2810. In Pell, the Court found that the press was not denied access to sources of information available to the public, and therefore, no violation of First Amendment rights occurred.[10] Id. The Supreme Court has suggested that, if there are other important interests to be protected in judicial proceedings, such protection may be accomplished "by means which avoid public documentation . . . " Cox Broadcasting Corp., supra, 420 U.S. at 496, 95 S.Ct. at 1047.

[11] The documents sought by appellants were not part of the public record.[11]In keeping with present Supreme Court guidelines, we do not think that the press had any First Amendment right of access to those matters not available to the public. See Garrett v. Estelle, supra.

There are many areas to which the public, and accordingly the press, traditionally have had no right of

[10]It appears that the logical extension of the media's right of access analysis is to determine what right of access the public has. The public right of access, however, has yet to be defined by the Supreme Court. Such a broad determination is not required by the limited questions presented for review here.

It is interesting to note, however, that in recent years rights of public access to government information have been established through legislative action, on the federal level for instance by 5 U.S.C. §552, The Freedom of Information Act (as Amended 1974). This statute has served as the model for similar legislation by many of the states.

[11]Appellants complain that their access to exhibits which were part of the public record was also unconstitutionally restricted. The trial judge permitted such access, but it was conditioned on his Court Clerk's availability. The reasonableness of this action is discussed infra, Note 13 and accompanying text.

access. Denials of access to such proceedings are generally based upon fundamental governmental interests and protections of other rights which override the concerns of the public. For example, the press and the public have historically been excluded from sensitive governmental activities such as grand jury proceedings, judicial conferences, see Branzburg, supra, 408 U.S. at 684, 92 S.Ct. at 2658, and in camera inspections of evidence. See United States v. Nixon, 418 U.S. 683, 714, 94 S.Ct. 3090, 3110-3111, 41 L.Ed.2d 1039 (1974). Admittedly, such denials of access hamper newsgathering. Any burdens, however, are generally incidental in view of the strong governmental interests involved.

The right of access to criminal proceedings becomes a highly controversial issue when First Amendment questions must be analyzed in conjunction with competing Sixth Amendment considerations. "A heavy obligation rests on trial judges to effectuate the fair-trial guarantee of the Sixth Amendment". United States v. Columbia Broadcasting System, Inc., 497 F.2d 102, 104 (5th Cir. 1974). "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). In a widely publicized case, "the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial". Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 394 (1968).

[12, 13] Thus, it is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. The trial judge is therefore granted broad discretion in ordering the daily activities of his court. [558 F.2d 1210] Id. at 401. "[A] trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity". Columbia Broadcasting System, Inc. v. Young, supra, 522 F.2d at 241. See also, United States v. Schiavo, supra, 504 F.2d at 6; United States v. Columbia Broadcasting System, Inc., supra, 497 F.2d at 106-07. Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations. Sixth Amendment rights of the accused must be protected always. United States v. Columbia Broadcasting System, Inc., supra; United States v. Schiavo, supra.

[14, 15] The trial judge in this case did not abuse his discretion in imposing the challenged restrictions on press access to documents. The refusal to direct that the names and addresses of the jurors be publicly released[12] was well within the bounds of such discretion. See "Free

[12]During the jury selection process, the names of the persons selected and other jurors being examined were called in open court. The district court imposed no restriction on publication of the names called in open court. But the judge was following a well-established practice when he refused to publicly release the jury list, which included the names, addresses, and other personal information about the jurors. Such protection of the privacy of the jurors was clearly permissible, and certainly appropriate in a trial which attracted public attention as this one did.

Press-Fair Trial", supra, 45 F.R.D. at 410. Similarly, the trial judge had the duty of determining which exhibits were entitled to come into evidence. The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain. When exhibits were received into evidence and the subject of scrutiny by press and public it was reasonable for the court to condition their examination by the press upon the Clerk's availability.[13]

[16] Bench conferences between judge and counsel outside of public hearing are an established practice, "Free Press-Fair Trial", supra, 45 F.R.D. at 403, and protection of their privacy is generally within the court's discretion.[14] No abuse of discretion with respect to the conduct of the bench conferences is demonstrated by the appellants. Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion.

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[13]In the hearing held on appellants' Petition, the district judge pointed to his trial Clerk's other taxing duties and the large number of exhibits involved as the basis for this restriction. There were several hundred exhibits in this case. The Clerk must account strictly for all exhibits in his safekeeping. Thus, it is of utmost importance for him to maintain them in systematic order, available when called for by court or counsel. These factors made it necessary to limit examination by the press to such times as the Clerk was available.

[14]"It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought." United States v. Nixon, supra, 418 U.S. at 714, 94 S.Ct. at 3110-3111.

[17] The district judge committed no error in denying access by appellants to Senator Gurney's grand jury testimony, and to the written communications between the judge and the jury. Gurney's grand jury testimony was not read to the jury in its entirety. The portion not published remained under the cloak of secrecy imposed by Rule 6(e), F.R. Crim.P. The judge permitted the appellant newsmen to obtain a transcript of that portion of the testimony read to the jury. It was proper to refuse to require the Clerk to blank out the unread portions of the grand jury testimony and deliver the transcript so excised to the news media.

[18] The press clearly has no constitutional right of access to the written communications between judge and jury. Compelling governmental interest in the integrity of jury deliberation requires that the priva[558 F.2d 1211]cy of such deliberations and communications dealing with them be preserved. Confidentiality is a shield against external considerations entering into the deliberative process. Such a shield prevents undermining of the integrity of the jury system. Juries must be permitted to deliberate fully and freely, unhampered by the pressures and extraneous influences which could result from access by the press to the deliberative process.

[19] The First Amendment does not protect against whatever incidental burdens on newsgathering occurred in this case. The trial judge employed reasonable "remedial measures", far short of prior restraints, to prevent possible prejudice and maintain an orderly trial. See Sheppard, supra, 384 U.S. at 362, 86 S.Ct. at 1522. The appellants were in no way prevented from investigating the other available sources to obtain the desired information. The district court's rulings denying

press access implemented a legitimate governmental interest in securing for the accused the fair trial guaranteed them by the Sixth Amendment. The court's actions bore a reasonable relation to the achievement of that purpose.

[20, 21] Finally, we find no error in the district court's failure to hold hearings and issue special orders regarding the appellants' requests for information. The oral rulings of the district judge specifically stated what was being withheld from the appellants. At the June 20, 1975, hearing and in his written order, the trial judge sufficiently explained his reasons for denying appellants access to documents. The subsequent requests were substantively identical to the requests considered at the June 30, 1975 hearing, and disposed of in the July 1 order. The terms of the orders and the reasons therefore were clearly stated.[15]

For the foregoing reasons, the district court's rulings appealed from are each AFFIRMED.

[15]Appellants rely on United States v. Schiavo, supra, to establish the requirement to hold hearings and issue special orders. In that case, however, the oral order: (1) gave no indication of the reasons for the order; and (2) failed to state specifically what conduct was being restrained. No such deficiencies are present here.

Moreover, it is unreasonable to require a district judge to hold hearings and to issue special orders with respect to every request he is presented with by the press during the course of a long trial. The later requests here were oral and informal. The judge responded in kind. It is the trial court's responsibility to decide which documents will be placed in the public domain, and which are entitled to privacy and confidentiality. These decisions are discretionary, numerous, and form an integral part of trial management. The efficient administration of the trial courts would be significantly impaired should we require hearings and special orders for each such decision.

United States Court of Appeals
For the Fifth Circuit

No. 75-3338

D. C. Docket No. 74-122-CR-J
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDWARD J. GURNEY, ET AL.,
Defendants,

MIAMI HERALD PUBLISHING COMPANY, ET AL.,
Movant-Appellants.

Appeals from the United States District Court
for the Middle District of Florida
Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that movant-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 12, 1977

Issued as Mandate: OCT 26 1977

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
October 18, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-3338 —
U.S.A. v. EDWARD J. GURNEY, MIAMI HERALD PUBLISHING CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Brenda M. Hauck
Deputy Clerk

**on behalf of appellants, Miami Herald Publishing Co.,

[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

Case No. 74-122-Cr-JK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD J. GURNEY, JAMES L. GROOT,
EARL M. CRITTENDEN, GEORGE ANDERSON,
JOSEPH BASTIEN, WAYNE SWIGER,
and RALPH M. KOONTZ,
Defendants.

PETITION OF THE MIAMI HERALD PUBLISHING COMPANY, THE TIMES PUBLISHING COMPANY, GENE MILLER AND ANGEL CASTILLO FOR HEARING AND FOR VACATION OF RESTRICTIONS ON PRESS, AND OTHER NEWS MEDIA

1. Petitioners are the following Florida newspapers and reporters:

(a) The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publisher of the Miami Herald.

(b) The Times Publishing Company, publisher of the St. Petersburg Times.

(c) Gene Miller, Miami Herald.

(d) Angel Castillo, St. Petersburg Times.

2. At the commencement of the trial in this action, this Court orally directed the Clerk to provide access only to attorneys with respect to exhibits marked for identification, exhibits admitted but not yet read to the jury and written documents read into the record and to deny access thereto to the press, including Petitioners, and the public.

3. Pursuant to this oral direction and subsequent oral directions of this Court, the Clerk refused to permit Petitioners access to:

[2] (a) The transcript of the grand jury testimony of Defendant Edward J. Gurney after the reading of such testimony in open court.

(b) Defense Exhibit No. 79, a copy of a purported statement of a witness, Larry Williams, to the Federal Bureau of Investigation, after being marked for identification but prior to it being identified in open court.

(c) Defense Exhibit No. 79 after it had been identified by a witness and admitted into evidence but prior to its being read to the jury.

(d) The list of all witnesses to be called in this case, although such witness list had been read in open court.

(e) The jury list after selection of the jury.

4. This case is one of manifest public interest and concern. Petitioners have written and published articles concerning this proceeding since its commencement and Petitioners' reporters have attended the trial from initial selection of the jury until this date.

5. This Court has instructed all jurors not to discuss the case, not to read any newspapers, and not to listen to or view any broadcast with respect to the trial and there is no reason to believe the jurors are not complying with these instructions.

6. In connection with the prosecution's case, the entire grand jury testimony of Defendant Edward J. Gurney was read to the jury and is part of the record of this case. In order that their articles with respect to this testimony be as accurate as possible and in connection with subsequent articles dealing with testimony in the case which might be confirmatory of or in contradiction to such grand jury testimony, Petitioners have requested that the grand jury testimony as read to the jury be furnished to them for inspection. The Clerk denied Petitioners access to such grand jury testimony, stating the transcript of the testimony had been sealed and Petitioners could not have access thereto.

[3] 7. During cross examination of prosecution witness Larry Williams, Defense Exhibit #79, purporting to be a copy of a transcript of witness Williams' statement to the Federal Bureau of Investigation, was marked for identification, but not admitted at that time into evidence. On request by Petitioners to view this document, the clerk denied Petitioners access thereto,

and ordered the Clerk not to permit Petitioners to see such document until introduced into evidence in this case.

8. On June 25, 1975, Defense Exhibit 79 was identified by defense witness Diane Nerheim and admitted into evidence. Again Petitioners asked to view the exhibits and again the Clerk denied Petitioners' request, this time stating the Court had ordered the Clerk not to permit Petitioners access thereto unless such exhibit is read to the jury.

9. During the trial the list of all proposed witnesses was read in open court and is thus part of the record in this case. Although part of the record, the Clerk at the direction of the Court has denied Petitioners access thereto.

10. On June 13, 1975, Petitioner Miller requested access to the names of the jurors, their addresses and the amount of money paid to them to that date for jury service for preparation of an article. Although the names and addresses of such jurors are part of the record in this case, the Clerk denied Petitioner Miller access to this information. The Clerk also refused to provide Petitioner Miller with any information as to compensation of individual jurors.

11. All the foregoing directions were entered without giving prior notice or opportunity to be heard to Petitioners or any other representatives of the press. Therefore the entry of each of these directions denied Petitioners due process of law, [4] violated the freedom of press guarantee of the First Amendment to the Constitution of the United States, and violated the

procedural requirements of the Federal Rules of Criminal Procedure.

12. Each of these directions prevents Petitioners from reporting matters of substantial public interest and concern and denies the public its right to be informed as to such matters and therefore also denies due process of law and violates the freedom of the press guarantee of the First Amendment of the Constitution of the United States.

WHEREFORE, Petitioners pray that this Court:

1. Hold a hearing on short notice with respect to amendment of all directions of this Court described herein.

2. Amend all directions of this Court:

(a) restricting access by Petitioners to any exhibit offered at this trial for identification, any exhibit identified but not yet admitted, and any exhibit admitted but not yet read to the jury.

(b) restricting access by Petitioners to written documents which have been read into the record in this case, including without limitation,

(i) the grand jury testimony of Edward J. Gurney;

(ii) the witness list of prosecution and defense witnesses;

(iii) the names and addresses of jurors.

(c) otherwise restricting access to written materials which become part of the record in this case or otherwise become public records.

so as to eliminate all such restrictions.

[5] 3. Reduce to writing and have entered in the docket book of this Court any directions or orders relating to the matters set forth in this Petition.

4. Grant such further relief to Petitioners as may be appropriate.

PAUL & THOMSON

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was delivered by hand this 27th day of June, 1975 upon all counsel of record.

Parker D. Thomson

BRACKETED NUMBERS INDICATE PAGE OF TRANSCRIPT

[1] IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-122-CR-J

UNITED STATES OF AMERICA,

-vs-

EDWARD J. GURNEY, JAMES L. GROOT,
EARL M. CRITTENDEN, GEORGE ANDERSON,
JOSEPH BASTIEN, WAYNE SWIGER, and
RALPH M. KOONTZ.

30 June 1975

At Tampa, Florida

Before HON. BEN KRENTZMAN, Judge

[EXCERPTS FROM]
REPORT OF HEARING IN RE

PETITION OF THE
MIAMI HERALD PUBLISHING COMPANY,
THE TIMES PUBLISHING COMPANY,
THE TRIBUNE COMPANY, GENE MILLER, AND
ANGEL CASTILLO FOR HEARING
AND FOR VACATION OF
RESTRICTIONS ON PRESS AND OTHER
NEWS MEDIA.

EDWARD R. MACK, Official Reporter
326 Post Office Building
Tampa, Florida 33601

[3] THE COURT: Having practiced before the Bar approximately — well, wait just a minute and we will be ready to proceed with your matter.

MR. THOMSON: Your Honor, just for clarification, Mr. Miller has been under the impression — not directly given by the Court — that he was to deal with your Court through Mr. Gilbert; and at least in two or maybe three of these instances a direct question was placed to Mr. Gilbert; and at least one time Mr. Miller said, "Mr. Gilbert, is that your decision or is that Judge Krentzman's decision?"

And Mr. Gilbert went to speak to you and returned and said, "That is the Judge's decision."

[16] THE COURT: That is exactly — I don't know about him asking Mr. Miller; but Mr. Gilbert asked me; and what Mr. Gilbert has said is what I told him.

MR. THOMSON: I assumed that to be correct.

* * *

THE COURT: . . . What the Clerk says and does — when he says something he speaks for me. All right.

And the reason he does is because he speaks to me first, which is important. So that is correct. We have got that point solved.

Now with regard to Item (a) "The transcript of the Grand Jury testimony", you suggest somewhere that it was read — all read to the jury.

The fact is that is was not all read to the[17] jury.

The fact is that some of the defendants raised objections under what you will understand are Bruton questions.

They were fully discussed in the absence of the press.

After that ruling the rest of it was read to the jury.

So the transcript itself — as a matter of fact, that portion of it which was not read to the jury and publicized has never been removed from the proscription of Rule 6, which prohibits it from being publicized. But I don't stand behind that.

It will stand along with all of the other matters that were not read to the jury which I have precluded from delivery to the press.

* * *

[18] Now I have never precluded — that I know of — the press from getting from the Court Reporter a copy of anything that was read to the jury or that happened here; except any reference to a matter which occurred in the absence — occurred at the bench; or any matter relating to matters which I have received in camera.

But any matter which was read to the jury, the Court Reporter has been under the instruction —

Mr. Reporter, haven't you from time to time furnished the press with some portions? When they requested it?

THE REPORTER: Not of the Grand Jury testimony. . . .

* * *

[19] . . . MR. MANRY: Your Honor, could I ask a question of the Court Reporter?

THE COURT: Yes.

MR. MANRY: Mr. Mack, in reporting the portion of the Grand Jury minutes that were read in testimony, did you take down verbatim what was read or did you merely note the page and line numbers that were read in the existing transcript?

THE REPORTER: I made an electronic recording [20] of it.

* * *

[22] . . . MR. THOMSON: . . . There are several [exhibits] that have been identified but not yet admitted.

THE COURT: A great many. And I have not [23] allowed any of them to be delivered to or examined by the press.

* * *

[29] . . . THE COURT . . . We could talk about, as the other cases do, the question of sequestration. I discussed that with counsel.

That is a hard question for a lawyer to ask — to decide; because nobody knows the real effect of sequestration on a juror.

They have their opinions. And I am not going into the reasons they gave for the opinion, but the defendants did not want the jury sequestered. . . .

* * *

[30] . . . And it is going to be my intent and purpose to preserve these jurors from any — as best I can, without precluding it — and by saying that I have not entered an order that you cannot write their names — and I say this. I congratulated the press, by the way, and thanked them — when I asked them not to publish their names and they didn't, I thanked them.

* * *

[32] MR. THOMSON . . . There were a couple of matters in that regard that I would like to seek clarification on.

I would like to observe that this petition did not suggest, nor are any of the petitioners — it is not their province to suggest that the jury [33] should be sequestered. In fact the observation in this petition was that the Court has regularly issued special instructions to the jurors not to read — and, as far as anybody in the press knows, they are complying with those instructions.

THE COURT: Let me say this. As far as anybody else knows, they are; and it is all believed by everybody that they are.

I would suggest - - another thing you may not know — and the Clerk can tell me: There are, as Court's Exhibits in this case, a good many copies of newspaper reports. . . .

* * *

[34] . . . Did you know — I don't know whether you people know or not — that we are providing newspapers to the jury.

We are providing a copy of — no offense — I am not sure they get a copy of the Miami Herald because none of them live in that area. But they do get a copy of the St. Pete Times and a Tampa Tribune and, I think, the Sarasota papers. . . .

THE COURT: Which the parties meet every morning and cut out — matters. So those articles have been removed.

But we do think they ought to be allowed to keep up with the current events.

So they get copies of the newspapers every morning, and during the recesses they can read the papers.

* * *

[38] THE COURT . . . If, to preserve a fair trial in this Courtroom, I have to stop and enter a written Order every time I do it — if somebody tells me I have to do it, I will do it, but not until.

And I am not going to have a hearing and give a due process hearing to the press before I do it.

* * *

[41] THE COURT . . . "Having assigned almost all of the available seats in the courtroom to the news media the [42] judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial".

That is what he says happened in Sheppard.

It has not happened in this case.

The newsmen have been perfect gentlemen. They have cooperated, and I don't suggest that. I want to make that clear.

* * *

[45] MR. THOMSON: Your Honor has said that you do not intend to issue written orders in these matters and to hold hearings on this type of matter unless instructed to do so, in effect.

THE COURT: What I have said is that I did not think it was necessary in this case, and I had no idea it would be necessary, and nobody has suggested it was necessary until this petition was filed.

I have said that in the future I may do that because I learn from experience.

* * *

[51] THE COURT: But my point is that nobody has ever asked for an Order before and I have not felt the need for an order.

We haven't had any — I guess, as far as I know, I don't know what goes on in people's minds; but I thought everybody was fairly happy.

* * *

[56] MR. THOMSON: Then the issue of defense Exhibit No. 79 before it was admitted is not at issue as such; but the issue of exhibits offered for evidence but not yet received in evidence is an issue before this Court.

THE COURT: I am not going to let you see [57] them in this case.

MR. THOMSON: . . . the Clerk should disclose those exhibits to the press.

THE COURT: Maybe he should but I am telling him not to do it.

I have told him not to do it. I tell him not to do it. I am telling him not to do it in the [58] future.

For this reason — for two reasons. I hope that the jury is not reading what is in the newspapers. I don't think they are. But there is always that bare possibility.

The very fact that they have been rejected in this case — this is a well prepared case. I mean the press is doing actually a remarkable job.

I have come to a renewed appreciation for investigative journalism.

* * *

[60] MR. THOMSON: Your Honor, with respect first to the specific issue of identified exhibits or exhibits offered into evidence but rejected; to my mind, Your Honor, it is no different than a proffer that may come in out of the presence of the jury in open Court. And Courts have regularly held that this is publishable under the First Amendment.

THE COURT: All right, just a moment. Excuse me.

[61] Interestingly enough, you ought to add to your list the fact that I have Bench Conferences here, and so those proffers don't come in publicly.

They are on the record.

MR. THOMSON: Well Bench Conferences being what they are, we don't know what goes on at Bench Conferences.

THE COURT: That's right. Well then, you ought to add that to your list of things that I do. I have a lot of them.

. . . MR. THOMSON: Well the fact is that the assumption is that the newspapers are not being read on this issue by the jury. The jurors have been [62] instructed.

THE COURT: That is an assumption which I hope is true, but it is not — you don't know whether they are or not — do you?

MR. THOMSON: . . . And the defense apparently in no way wants to prevent them from reading the newspapers as such because it does not desire to sequester the jury. It obviously does not want them to read the newspapers; but it does not recommend to the Court the one thing that would clearly stop them from reading the newspapers; which is to sequester the jury.

THE COURT: Well, I think they came close. They made a decision after I had told them what I was going to do.

And in reliance — knowing me and the way I conduct a trial, and counting on me to preserve a fair trial.

Now I am not sure they would have said that with some — they certainly would not with the Judge who was going to conduct the Sheppard trial.

* * *

[68] . . . MR. THOMSON: The final element, Your Honor, [69] is the Grand Jury testimony of Senator Gurney, which could be taken in any form that protects the portions of it that were not admitted in evidence.

* * *

THE COURT: The only way you are going to get that is to get the transcript from the Court Reporter.

MR. THOMSON: Well may I ask the Court Reporter: If one were ordered how fast could we get it?

THE REPORTER: By being able to xerox part of it, I could probably get it to you in a week to ten days.

THE COURT: Well you are not going to be able to do what the Clerk cannot do.

Here is the point. There may be some dispute about it.

I had a copy that is marked.

[70] The person who was reading it had a copy and the person who was answering had a copy, and the defendants had a copy.

I don't think there was any inadvertent slip in something and went to the jury that shouldn't have gone; but the idea — I am not going to rely — when this matter — if it ever goes up and there is an appeal, the thing that all the parties will rely on and that everybody else will rely on is the transcript that this Reporter prepares. And that is the only thing that is ever going to be furnished to the newspapers as far as I am concerned.

Now if you want to get one, you can, and thats it.

THE REPORTER: Let me intrude this explanation, Judge.

Tomorrow I have to start delivering daily copy in the Gurney case which will consume my time far into the night for a long time; and if I have to screen every syllable of that transcript that was read, it would be a matter of weeks.

THE COURT: Well it wouldn't have been as long if you had started earlier. But, at any rate, thats it.

* * *

[71] MR. THOMSON: The result of what the Court has ruled on this effectively means, from what the Court Reporter has said, that the Grand Jury testimony cannot be gotten until the trial is probably going to be over with.

So it becomes of interest historically or [72] not at all.

THE COURT: Well, if thats the way it is, thats the way it is. . . .

* * *

[73] THE COURT . . . The jury is not going to ever have that transcript.

Why should the press or the public or anybody else?

MR. THOMSON: And that apparently is not possible —

THE COURT: And I guess if the press wants it, and the Court Reporter has time, he will read it to them.

[87] THE COURT . . . And, Mr. Castillo, you are not going to be allowed to look at all the exhibits [88] received in evidence but not read to the jury.

And if that be trespass as the First Amendment, so be it, that is in this case. That is what I am going to do.

* * *

[99] CERTIFICATE OF REPORTER

I HEREBY CERTIFY that the foregoing is a correct and complete report of the proceedings detailed therein, reported by me personally and transcribed under my supervision.

EDWARD R. MACK
Official Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 74-122 Cr. J-K

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD J. GURNEY, et al,
Defendants.

ORDER

On June 27, 1975 the Miami Herald Publishing Company and others filed a petition for hearing and for vacation of restrictions on press and other news media, supported by a memoranda. On that date the Court scheduled a hearing on said petition for June 30, 1975 at 10:00 A.M.

Petitioners presented evidence, the Court received and made stipulations as to facts, heard argument of counsel, and has fully considered the same.

The proceedings were reported, are available for transcription, and the parties stipulated that the findings made by the Court and the reasons therefor could and should be considered a part of this order.

Under the circumstances described at hearing the Court confirmed that prior to this time there has been no written order such as authorized, but not required, by Rule 16(C) of the local rules of this Court, with respect to the matters raised by the petition. The Court has from time to time, as the need arose, issued instructions either to the Clerk of this Court, to the courtroom bailiff, or directly to those persons involved in the courtroom and on the record.

For the reasons given at hearing, the names and addresses of jurors are and have been kept confidential both before and after the impaneling thereof excepting only that counsel for the respective parties are allowed the use of same during the voir dire proceedings. This, of course, would not apply in the case in which a defendant is charged with a capital offense.

The request for disclosure of the transcript of the grand jury testimony of defendant Gurney was, and is DENIED. Although the majority of said transcript was read to the jury in open court, objections to some portions were sustained, and the transcript as such was not received as an exhibit. The prohibition against disclosure of portions not prohibited to the jury, contained in Rule 6, Federal Rules of Criminal Procedure, has not been waived and is not waived.

Defense Exhibit No. 79, which was identified sometime ago, and the disclosure of which has been prohibited, was admitted in evidence on June 25, 1975. Its disclosure to petitioners was authorized at the hearing.

Just prior to the time the jury was selected the plaintiff submitted partial lists of witnesses whom they expected to be called to testify. Those lists, together with additional names orally submitted to the Court by counsel, were included in the Court's initial instruction to the jury panel. That instruction had not been filed with the Clerk but was given by the Judge in open court. At hearing the relevant portion of instruction was produced for inspection by petitioners.

At hearing the Court confirmed that exhibits received in evidence could be examined by petitioners subject to the availability of the Clerk. The Court further confirmed that exhibits identified, not received in evidence, would not be disclosed.

At hearing the Court confirmed, as it has been obvious to all in the courtroom during the trial, that it had, and will, from time to time, conduct bench conferences with counsel during the trial, which are outside the hearing of representatives of petitioners.

At hearing no one suggested that the Court had ever cited any member of the press for contempt or suggested that it intended to do so, or that the Court had ever directed petitioners or its representatives not to publish anything, or had ever prohibited petitioners or its representatives from obtaining from the court reporter, at their expense, any transcript of matters actually published to the jury.

IT IS SO ORDERED at Tampa, Florida, this 1st day of July, 1975.

/s/ Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

CASE NO. 74-122-CR-J

UNITED STATES OF AMERICA,

vs.

EDWARD J. GURNEY, JAMES L. GROOT, EARL M. CRITTENDEN, GEORGE ANDERSON, JOSEPH BASTIEN, WAYNE SWIGER and RALPH M. KOONTZ.

AFFIDAVIT OF GENE MILLER

STATE OF FLORIDA)
) SS:
COUNTY OF HILLSBOROUGH)

Gene Miller, being duly sworn, hereby deposes and says:

1. I am a reporter for The Miami Herald, assigned to cover the trial in this matter since its commencement. I have been in daily attendance at the trial. I have personal knowledge of the matters set forth herein.

2. On July 16, 1975 Defendant Ralph M. Koontz ("Koontz") testified. In the presence of the jury Koontz was asked a question by counsel for Defendant Edward J. Gurney. The question was:

> "Prior to the time that you were indicted, did the United States attorney tell you that it would not indict you if you changed your testimony and said that you heard Forrest Howell talk to Sen. Gurney?"

The prosecutor objected to the question and requested that the jury be excused. The jury was excused.

3. After the jury was excused Judge Krentzman called all attorneys to the bench, heard the objection in private, and Koontz then gave what the judge later identified as a proffer of testimony in private extending for a period of some 26 minutes. Neither the bench conference nor the proffer of testimony could be heard by myself, other reporters, or the public.

[63] 4. The jury was then called back, the question was reread by the court reporter, and Koontz replied, "No".

5. Immediately thereafter I, together with a reporter for the St. Petersburg Times, requested the court reporter to read a transcript of the proffer. The court reporter discussed the request with Judge Krentzman in chambers, returned and stated to me:

> "[Judge Krentzman] said that was a proffer and not testimony, and the answer about the transcript is negative."

6. The defense rested on July 16, 1975. The jury was then excused and Judge Krentzman stated from the bench to myself and the other reporters:

> "Those matters were proferred outside the presence of the jury, and I've directed the court reporter to seal them. You will not be able to get that."

7. Attached as Exhibits A and B are copies of articles published in The Miami Herald and the St. Petersburg Times on July 17, 1975. These articles accurately describe what occurred on July 16, 1975.

8. On July 17, 1975 the prosecution rested and all testimony in the case was completed.

9. Since July 21, 1975 the jury in this case has been sequestered.

10. On July 30, 1975 the jury delivered to the United States Marshal a single yellow sheet of paper. This paper was delivered to Judge Krentzman. Judge Krentzman then summoned all attorneys to a bench conference which lasted 38 minutes. Although the jury was not present, the conference was conducted in such a manner as to be inaudible to affiant, other reporters and the public.

11. After a 19 minute recess during which a written response to the apparent jury question was prepared, Judge Krentzman again summoned all attorneys to a bench conference. Although the jury was not present, the conference was conducted in such a manner as to be inaudible to affiant, other reporters and the public.

12. The sheet from the jury was admitted as a court exhibit. Affiant and other reporters requested that

they be allowed to inspect it. The Clerk refused to produce the sheet, stating that the judge had instructed him to so refuse.

13. Attached as Exhibit C is a copy of an article published in The Miami Herald on July 31, 1975. The article accurately describes what occurred on July 30, 1975.

/s/ Gene Miller
Gene Miller

SWORN TO and SUBSCRIBED before me this 31st day of July, 1975.

[Signature Illegible]
Notary Public

My Commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEP. 24, 1978
BONDED THRU GENERAL INSURANCE UNDERWRITERS

EXHIBIT A

THE MIAMI HERALD Thursday, July 17, 197

Gurney, Co-Defendant Rest Their Defense; Rebuttals Set Today

GENE MILLER

with Larry Williams about purchase of some property in Dade County where you would be a silent investor" the prosecutor asked.

"NO, SIR," replied Kennie. He said it emphatically.

Kennie took the witness stand stripped to a dark blue suit, white shirt and blue tie, with a styrofoam cup of water in his hand and a cube in his mouth.

He told about going to school in Topeka, and other night school, "finally" getting a degree from Long Island University in 1956. He is now 51. He became a legislative liaison man for HUD in Washington in 1969 as a G-13 after retirement from the Navy.

To get to Florida, where he had been Medical Advisor at Jacksonville, he took a drop in grade to G-11. "And since I've been suspended without pay, they've dropped me to C-12," he added, "I don't know why."

Harvey Schlesinger, chief prosecutor, turned from his chair, [illegible] U.S. District Court Judge Ben Krentzman and whispered, "I am going to take a position." Krentzman was [illegible] 3:24 p.m.

A petition to a statement by the witness explaining what he would reply to a question [illegible] answer it. The judge listens to the petition out of the hearing of the jury and decides whether it's admissible testimony. If the testimony is to be allowed, the jury is [illegible] asked in to hear the answer.

Kennie spent several minutes before the judge in closed conference, telling him how he would answer Dittmer's question about the leasing pay.

Under instructions from Krentzman, court reporter Tyd Idath [illegible] to read Kennie's statement to prosecutor.

The jury returned at 2:32 p.m.

Dittmer's question was read again: Had the government wanted Kennie to change his testimony?

"The answer is no," replied Kennie. There were other questions.

Kennie, a striking, tanned athlete-at-heart, shows Kenna native with an unorthodox personality, took the witness stand and said he had not met his co-defendant, Beckham, until they were introduced at the trial.

SHONTZ said he knew Larry Williams, the sole-employed Gurney fund-raiser who testified he collected $400,000 in cash from Florida builders in Gurney's name.

"What his position was, I don't know til this day — even after testifying five months[illegible]," said Kennie.

"Did you know he was a fund-raiser for Sen. Gurney?" asked U.S. Attorney Ralph Hutchison.

"I did not," said Kennie. "Never knew."

Williams, said Kennie, didn't like his boss, Florent Howell.

"I DON'T think Williams liked anybody very much. I don't think he liked me very much; anybody who worked in the executive branch of the government was a bureaucrat and no good.

"I don't remember discussing any project with Larry Williams," Kennie declared.

Prosecutor Hutchison read through a list of FHA projects, producing some other names before he read [illegible] about FHA mortgages.

"Did you give a list of builders to Larry Williams?" the prosecutor asked.

"I may have," said Kennie. "They were certainly available to anyone who asked for them."

"Did you ever have a discussion

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PAUL & THOMSON

JUL 30 0 17 AM '75.

Defense rests in Gurney trial

RALPH KOONTZ
. . . final defense witness.

By ANGEL CASTILLO JR.
St. Petersburg Times Bureau

TAMPA — The defense rested its case Wednesday at the U.S. District Court trial of former Republican U.S. senator Edward J. Gurney and three others, clearing the way for jury deliberations to begin sometime next week.

One of the final defense witnesses at the 21-week-old trial was defendant Ralph M. Koontz.

After denying having participated in an alleged fund-raising conspiracy and having been cross-examined by the prosecution, Koontz was asked a potentially explosive question by Gurney's lawyer, C. Harris Dittmar of Jacksonville.

IN THE PRESENCE of the jury, Dittmar asked Koontz if the prosecutors had once promised not to indict him as long as he changed his testimony and implicated Gurney in the fund-raising.

Koontz, 51, former assistant in Jacksonville to the Florida area director of the U.S. Department of Housing and Urban Development (HUD), was prevented from answering by a loud objection from chief prosecutor Harvey E. Schlesinger.

Schlesinger, an assistant U.S. attorney in Jacksonville, jumped to his feet and demanded that the jury be immediately led out of the courtroom. This done, he approached Judge Ben Krentzman to voice a lengthy objection in secret to Dittmar's question.

REPORTERS covering the trial from the spectator benches could not hear what went on. All lawyers in the case, as well as Koontz, Gurney and co-defendants Joseph Bastien and K. Wayne Swiger stood near Krentzman as the debate continued.

Koontz then left the huddle with his lawyer, Carlton Maddox of Jacksonville, and the two conferred in private for a few moments.

Immediately thereafter, Koontz and Maddox rejoined the huddle. Koontz was seen giving testimony to Krentzman that was taken down by the court stenographer, including answers to questions from Krentzman and Schlesinger.

AFTER THE lengthy proceeding, the jury was brought back into the courtroom and Krentzman had the court reporter re-read Dittmar's question about alleged promises to Koontz by the prosecutors.

Koontz replied: "No." He then was excused as a witness, and there was no more public discussion of the matter.

Reporters for The St. Petersburg Times and the Miami Herald made a formal request to court stenographer Ted Mack for a transcript of Koontz' testimony by the judge's bench.

After checking with the judge in his chambers, Mack said: "He (Krentzman) said that was a proffer and not testimony, and the answer about the transcript is negative."

A "PROFFER" is a legal term used by lawyers to describe what they believe the evidence would be if a certain witness were called to testify or certain documents were presented at the trial.

After the jury was sent home at the end of the day, Krentzman addressed reporters from the bench: "Those matters were proferred outside the presence of the jury, and I've directed the court reporter to seal them. You will not be able to get that."

Krentzman had acknowledged earlier that he has taken a number of such secret proffers during the trial outside the hearing of the jury and reporters. He says he can keep such matters secret under his discretionary powers as a judge.

EXHIBIT B

App. 50

EXHIBIT C

Jury Deliberates for Third Day

Jury Quits Deliberations; They'll Try Again Today

TAMPA — The jury in the bribery conspiracy trial of Edward Gurney quit its deliberations without a verdict Wednesday. It will try again Thursday.

At 4:25 p.m. juror James Baker, the apparent foreman, knocked on the door and gave a U.S. marshal a single sheet of paper from a yellow pad. The jury quit for the day at 5:30 p.m. It had deliberated 12 hours since it began on Monday.

U.S. DISTRICT Judge Ben Krentzman summoned prosecution and defense lawyers and they met at a bench conference for 35 minutes.

After a 19-minute recess to prepare a written response to the jury, Krentzman again summoned the lawyers for a secret bench conference.

He was overheard to say, "I have it under advisement and I will advise you tomorrow morning."

THEN A NOTE from Krentzman was delivered to the jury at 8:57 a.m. Thursday. It had deliberated 17 hours since it began on Monday.

Krentzman instructed lawyers to return to court at 9 a.m. Thursday.

The note from the jury was made a court exhibit, which normally is a public document. The clerk refused to let newsmen inspect it, saying the judge had instructed him not to permit it.

App. 51

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

CASE NO. 74-122-CR-J

UNITED STATES OF AMERICA,

vs.

EDWARD J. GURNEY, JAMES L. GROOT, EARL M. CRITTENDEN, GEORGE ANDERSON, JOSEPH BASTIEN, WAYNE SWIGER and RALPH M. KOONTZ.

AFFIDAVIT OF ANGEL CASTILLO

STATE OF FLORIDA)
: SS
COUNTY OF HILLSBOROUGH)

Angel Castillo, being duly sworn, hereby deposes and says:

1. I am a reporter for The St. Petersburg Times, a newspaper published by Times Publishing Company, assigned to cover the trial in this matter since its commencement. I have been in daily attendance at the trial. I have personal knowledge of the matters set forth herein.

2. On July 30, 1975 the Judge in this cause received a written communication from the jury on a single yellow sheet of paper. I requested permission from

the Clerk to read the communication, which permission was denied.

3. On July 31, 1975 I asked the presiding judge in this cause personally for permission to read the communication from the jury and the judge denied my request saying that the communication would be available for inspection after the jury returned a verdict.

4. Subsequently on July 31, 1975 the Judge prepared and caused to be delivered to the jury in this cause a written response to their prior communication to him. Gene Miller, a reporter for the Miami Herald, in my presence and for our mutual use requested the Clerk of the Court to permit our inspection of the Judge's written response to the jury. We were refused.

/s/ Angel Castillo
Angel Castillo

SWORN TO and SUBSCRIBED before me this 31st day of July, 1975.

[Signature Illegible]
NOTARY PUBLIC

My Commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEP. 24, 1978
BONDED THRU GENERAL INSURANCE UNDERWRITERS

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA

MIDDLE DISTRICT OF FLORIDA

I, WESLEY R. THIES, CLERK, of the United States District Court in and for the Middle District of Florida, and as such the legal custodian of the records and files of said Court do hereby certify that the foregoing documents number 1 to 20, inclusive, are the original papers in the cause of: MIAMI HERALD PUBLISHING COMPANY, ET AL, PETITIONER'S, VS., BEN KRENTZMAN, RESPONDENT - Case No. 74-122-Cr-J-K, to be included in the record on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court at Tampa, Florida, on this 20th day of August, 1975.

WESLEY R. THIES, CLERK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BY [Signature Illegible]
Deputy Clerk

[BRACKETED NUMBERS INDICATE PAGE OF THE TRANSCRIPT]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 74-122-CR-J

UNITED STATES OF AMERICA

-vs-

EDWARD J. GURNEY, JAMES L. GROOT, EARL M. CRITTENDEN, JOSEPH BASTIEN, WAYNE SWIGER, RALPH M. KOONTZ

February 20, 1975
At Tampa, Florida
Before HON. BEN KRENTZMAN, Judge

[EXCERPTS FROM]
REPORT OF STATUS HEARING

[Status Hearing was open only at commencement, and closed to press and public as shown herein shortly thereafter. Finally transcribed in January, 1978. The bracketed page references indicate the page of the full transcript in which the words appear.]

EDWARD R. MACK, Official Reporter (Ret.)
830 Hillsboro Building, 512 Florida Avenue,
Tampa, Florida 33602

* * *

[17] And I'm going to hear you as to why, in your judgment, that should merit either a continuance or whatever; but I'm going to do that outside the presence of the press; and I'm going to do it simply because if there is any merit to your motion — and I will decide that — there is no reason to add any additional merit to it by discussing whatever you have got to say in the way of your views about this.

And that's that.

Thank you very much, ladies and gentlemen. You may now go outside the Courtroom.

If there are any Defendants here, they may remain and the attorneys may remain.

PROCEEDINGS AT CLOSED HEARING

(Thereupon, the following proceedings were had at the closed hearing above-recited, outside the presence of the press and other spectators.)

* * *

[41] MR. FLOYD: Has Your Honor considered — instead of taking the position, Your Honor, that the Crittenden plea, which has now been furnished. It is a public record. It is in each of our hands now. Instead of keeping that a secret — on behalf of the Defendant Groot it would remove at least some of the stigma if that were announced. And at least it would eliminate one of the remaining six.

THE COURT: Announced what? Who it is?

MR. FLOYD: Yes, sir.

THE COURT: Oh. Yes.

I sent the press off. I guess that was a mistake.

[42] But I doubt if they went very far away.

I'm not going to announce anything.

I told all of you not to talk to the press. I don't know how they know it. Maybe they will find out all about it.

I sometimes — I don't know. But —

* * *

[51] MR. DITTMAR: Yes, Your Honor. I think the public ought to be acquainted with the letter of February 19, 1975. The whole facts. To show what kind of plea arrangement has been made with Mr. Crittenden at this time.

THE COURT: Well, the public is not concerned. The only persons concerned are the Jurors. Legitimate concern.

[81] THE COURT: All right. What else?

MR. FLOYD: Well, Your Honor, I don't know that it has been made, but the Defendant Groot would at this time move that the Jury, after selection, be sequestered.

THE COURT: I asked you about that. I did not make the decision.

you coming into the building, they may say 'Good morning' or 'Good afternoon' — but they are being instructed not to do that."

Not to talk about, with members of the Jury — this is when they are not sequestered, of course — about anything, period.

And that avoids somebody from the Government coming in and saying, "Judge, I saw Mr. So-and-so say something to a juror and I don't know what it was."

Or you saying, "One of the District Attorneys was smiling at a juror as he came in the room and I wish you would tell him to stop."

And that's the reason.

So I tell the jurors that and I tell the press that. And we will do that at the time of the trial.

* * *

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-122-CR-J

EDWARD J. GURNEY, JOSEPH BASTIEN,
WAYNE SWIGER, RALPH M. KOONTZ

July 2, 1975

At Tampa, Florida

Before HON. BEN KRENTZMAN, Judge

[EXCERPTS FROM]
TRIAL TRANSCRIPT

(TESTIMONY OF EDWARD J. GURNEY)

[Transcribed on a daily basis, but not filed with the District Court until January, 1978.]

EDWARD R. MACK, Official Reporter
326 Post Office Building
Tampa, Florida 33601

(Upon the resumption of the trial on July 2nd, 1975, at 9:00 o'clock A.M., pursuant to the adjournment, the following further proceedings were had in the absence of the jury and at the bench, out of the hearing of spectators:)

THE COURT: Come forward, gentlemen.

* * *

THE COURT: Now this is a problem. I am going to deny that motion.

The trial — the jury is waiting now.

[34] I just — this is a matter that really deserves my attention in an Order that says something, but how I am going to do it — my secretary of eight years has just retired; my Senior Law Clerk has just retired and I have got a new Law Clerk. And I am trying to arrange a calendar for a visiting Federal Judge who is going to try some people who are in jail, who is coming Monday; with all of those attendant details.

How I am supposed to go back and write an erudite opinion about something, I don't know, but I have got to enter an Order.

Rule 55 says I should enter an Order, and I should have entered an Order the last time and I am going to enter an Order now.

And so I come to the question that up until now the Clerk has not allowed inspection of any of the motions or any other things, under my instructions.

And I am beginning to wonder, after having heard from the representatives of the press Monday, whether that is proper.

Now the press said to me — I said [35] — and this was not Monday but in a colloquy with a member of the press before this case ever started — I said, "I am not too concerned about what happens at a Bench Conference for instance; because it is on the record. And, if there should be a conviction, the record will be transcribed and all the world will know what happens."

And he said to me, "Suppose you make rulings up at the bench which are consistently favorable to the defendant; and incorrectly so. And the jury has found not guilty. We can't go spending the money to have all of the transcripts. How would the press ever know that you were not — that you were denying to the government the right to present a fair trial?"

That is a good question.

Well this had not occurred to me because I considered myself so fair and equitable that I would never make a mistake. But that is a mistake when anybody begins to assume that.

That is what every dictator in the world has ever assumed. And I am not a dictator; but, on the other hand, some people [36] may think that some of my rulings are.

I am getting down to the point now that I think I am required just to file all of these motions and pleadings and file the Order.

* * *

MR. DITTMAR: Well, Your Honor, no harm will result to the United States of America or to the Comptroller General if that order is not made of record and available to [39] the press until after this case is completed.

THE COURT: But in the Court of Appeals or whatever — you people are going to go back and give some attention to some other things. I am going to be here looking at the press and my conscience.

At any rate, I made the initial decision and I think it is a proper one.

I am going to enter an order. I have said it is not going to be any Law Review article. It is not going to be as good as I could do if I took off about two days and wrote it.

But I am going to enter an order and I am going to try to enter it today. And I am going to direct the Clerk to keep all of the papers — you should have all of these papers now — and to enter on the record that I have made an Order, but seal the whole thing.

THE CLERK: Yes sir.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-122-CR-J

EDWARD J. GURNEY, JOSEPH BASTIEN,
WAYNE SWIGER, RALPH M. KO ONTZ

July 7, 1975

At Tampa, Florida

Before HON. BEN KRENTZMAN, Judge

[EXCERPTS FROM]
TRIAL TRANSCRIPT

(TESTIMONY OF EDWARD J. GURNEY)

[Transcribed on a daily basis, but not filed with the District Court until January, 1978.]

EDWARD R. MACK, Official Reporter
326 Post Office Building
Tampa, Florida 33601

[4] (Thereupon the following proceedings were had at the Bench, out of the hearing of spectators:)

[6] THE COURT: Keep your voice down, Mr. LaPorte.

MR. LaPORTE: Yes, sir.

THE COURT: We are at the Bench. And the purpose, hopefully, is that the press won't hear about this unless you want to turn around and make a speech before the press, which I don't think you want to.

MR. LaPORTE: I am not attempting to make a speech to the press.

THE COURT: Keep your voice down.

I can hear you.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1695

In re

THE WASHINGTON POST COMPANY,
POST-NEWSWEEK STATIONS,
CAPITAL AREA, INC.,
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS,
RADIO-TELEVISION NEWS DIRECTORS
ASSOCIATION,
SOCIETY OF PROFESSIONAL JOURNALISTS
(SIGMA DELTA CHI), MARYLAND
PROFESSIONAL CHAPTER,

Petitioners.

FILED

No. 76-1698

In re

THE A. S. ABELL COMPANY,

Petitioner.

No. 76-1699

In re

THE HEARST CORPORATION
(BALTIMORE NEWS-AMERICAN,
WBAL-TV, and WBAL RADIO
DIVISIONS),

Petitioner.

No. 76-1711

In re

WESTINGHOUSE BROADCASTING
COMPANY, INC.,

Petitioner.

WRIT OF MANDAMUS

BEST COPY AVAILABLE

On July 2, 1976, we stayed the order of the district court entered in United States v. Mandel, Criminal No. P-75-0822 which order directed the Clerk to seal all papers filed after June 17, 1976. We granted leave to the government and the defendants to file responses to the applications for a writ of mandamus on or before July 12, 1976. We have now carefully considered the responses that have been filed and have concluded that the order of the district court is an unnecessary prior restraint on freedom of the press in violation of the First Amendment to the Constitution of the United States.

It is accordingly ORDERED, ADJUDGED and DECREED that the United States District Court at Baltimore for the District of Maryland vacate its order entered on June 18, 1976, in No. P-75-0822 which order directed Mr. Schlitz, the Clerk of the Court, to place all subsequent filings in United States v. Mandel under seal. The Clerk of our court will immediately issue the appropriate writ of mandamus.

Done with the concurrences of Judge Butzner and Judge Widener, this 19th day of July, 1976.

United States Circuit Judge

A True Copy, Test:
William K. Slate, II, Clerk
By _____
Deputy Clerk

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United States Circuit Judge

A True Copy, Test:
William K. Slate, II, Clerk
By _____
Deputy Clerk